GROUP ONE

CONTRACT 1 (LCI 201)

LECTURER IN CHARGE: DR ONAKOYA

Question:"Parties to an agreement retain the commercial freedom to determine their own terms and no other person, not even the court can determine the terms of the contract between them" Per Kekere-Ekun JSC in Delmas v. Sunny Asitez Int'l ltd (2020) All FWLR pt. 1026 at 541, paras: B-C

Explain the above with the aid of decided cases.

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INTRODUCTION

The principle that parties to a contract possess the freedom to determine their own contractual terms is a foundational concept within Nigerian contract law. This principle ensures that individuals and businesses retain control over their commercial dealings, fostering a legal environment that promotes predictability, autonomy, and fairness.The commercial and economic life of our modern society consists very largely of agreements. Such that if those agreements are not regulated by means of enforcement in law courts, trade and commerce would be chaotic. Hence, a promisor won't get away with a breach of an agreement without compensating the aggrieved party for his loss. To ensure peace, order and the smooth efficient operation of trade and commerce, the law recognises the need for the satisfaction of reasonable and well-founded expectations created by promises and agreements. The Supreme Court, through the judgment of **Kekere-Ekun JSC in Delmas v. Sunny Asitez International Ltd (2020**), reaffirmed that no external entity, including the courts, has the authority to alter or impose terms on a contract that the parties themselves have not agreed upon. This ruling highlights the respect the judiciary accords to the sanctity of contract, emphasizing that the role of the courts is primarily to enforce, not to rewrite, agreements. This principle is deeply engraved in the doctrines of consensus and freedom of contract, which prioritize the parties' intentions and their capacity to freely negotiate terms that suit their individual needs and circumstances.At the heart of this freedom lies the foundational concept of "**Consensus ad Idem**" (the meeting of minds), that for any contract to be valid, both parties must fully understand and mutually agree upon the terms, ensuring that their intentions align.The commercial world depends heavily on such autonomy, as it allows for flexibility, innovation, and efficiency in business transactions. However, this freedom is not without limits; Nigerian courts recognize that party autonomy must be balanced against the requirements of law, public policy, and fairness.

THE CONSENSUS THEORY

Contracts arise from mutual consent, often described as the 'meeting of minds'. Consensus theory asserts that the essence of a valid contract is the genuine agreement between parties on their rights and obligations. It places paramount importance on the parties' intentions, which must be freely and voluntarily expressed. This theory supports the idea that once parties agree on contract terms, those terms reflect their true will and must be respected. Nigerian courts adhere strictly to this principle, refusing to rewrite or substitute agreed terms with their own interpretations**."Consensus ad idem**" or "**meeting of the minds**" is a common law concept that requires both parties, entering into a contract, to have a common intention to accept and comply with the terms outlined in the contract. It is a universal principle guiding all contracts all over the world. It has also been adopted into some state laws. For example, the Malaysian law, as seen in **Section 13** of the **Contracts Act 1950**. The section provides that parties are said to consent to something '*when they agree upon the same thing in the same sense*.' In other words, the meeting of minds takes place when both contracting parties fully understand and freely consent to undertake all contractual obligations upon entering a contract. This principle was further emphasised in the case of **B.F.I GROUP v. BUREAU OF PUBLIC ENTERPRISES (2008) All Federation Weekly Law Reports (All FWLR) Pt. 416 Pg. 1915 at P. 1937, paras E-H** gave a comprehensive explanation as follows:

> ***"A contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For a valid contract to be formed, there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incidents. They must be saying the same thing at the same time. They must not be saying different things at different time. Where or when they say a different thing at different times, they are not id idem and therefore no valid contract is formed. The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract. An agreement will not be binding on the parties to it until their minds are at one both upon matters which are cardinal to the species of agreement in question and also upon matters that are part of the particular bargain".***

This theory is crucial in forming contracts and ensures that parties are only bound by their mutually agreed-upon terms. It respects the autonomy of the parties and allows them to create their own contracts within the confines of the law. When interpreting contracts, the courts try to understand and enforce the parties' agreements, rather than to impose external standards. An example of this is the stance of the adequacy of the consideration in a contractual agreement. The courts do not nullify an agreement because there seems to be a disadvantaged party with regards to the bargains made. A decided case to this effect is that of ***Chappell v. Nestle***. It is sufficient to the courts, that the consideration is something of value in the eye of the law.

CONCEPT OF 'CONSENT' IN CONTRACT LAW

Contract only arises because of mutual expression of assent, this means, legal relations cannot exist except the parties intend them to. Contract law is basically about allowing parties to enter arrangements on terms they choose. Each party imposing obligation on itself in return for obligation another party has placed upon itself. This freedom to contract; an ideal by which there are obligations to the extent, and only to the extent, that they are freely chosen by the parties, is what differentiates contract law from duties of Criminal law and Tort law, which bind all parties regardless of consent. Thus, ***consent*** in contract law has to do with the unequivocal, informed and voluntary agreement of a person to participate in an agreement or transaction and the willingness to be bound by the terms agreed upon. It is the mutual understanding and agreement between parties involved in a contract. Contractual consent goes beyond mere agreement, it requires a meeting of the minds where parties understand and accept the terms and conditions, freely, without misapprehension or pressure. Consent is a fundamental principle that ensures fairness and justice in contractual relationships. For consent to be considered valid, the contracting parties must first possess Legal capacity to enter into a contract, this requires that both contracting parties have the capacity in age and mental fitness to enter into a binding agreement. Consent cannot be said to have been given when one of the contracting parties does not possess the mental capacity to comprehend the implication of the terms (see ***Nash v Inman***, [1908] 2 KB1). The validity of contractual consent is also measured in the willingness and voluntary assent to the terms of the agreement by the contracting parties. Assent by way of physical threat or economic duress is not a valid form of consent and such contract could be void or voidable. To maintain the integrity of consensual agreement, it is essential that all parties enter

into it freely without any form of duress or manipulation. ***Barton v Armstrong*** [1976] AC 104, and **Pao On & ors v Lau Yiu Long & anor** [1980] AC 614)

Conversely, the knowledge of contractual terms is also pivotal. For consent to be considered valid, it must be informed, each party must have full knowledge and a correct understanding of the terms of the contract. Any form of *Misrepresentation*; which is a false statement that induces a party to enter into a contract, (***Derry v Peeks*** [1889] LR 14 App Cas 337, UK) or ***Mistake*** **as** regards the fundamental terms of the contract, (Bell v Lever Brothers Ltd [1932] AC 161) punctures the validity of the contractual agreement. Mutual agreement also stands as a factor that affects the validity of consent in an agreement. Contacting parties must mutually agree on all essential terms of the contract. This is known as **consensus ad idem**, which is "the meeting of the minds of contracting parties."

It is not enough for one party to agree to certain terms, but, both parties must be at agreement in all terms constituting the contract. In the case of ***Best Nig Ltd v Blackwood Hodge Nig Ltd***, **[2011] 5 NWLR 95, Adekeye, JSC** put it thus: "*..The parties to the agreement must be in consensus ad idem as regards the terms and conditions freely and voluntarily agreed upon by them*." This was also established in ***Guarantee Trust Bank PLC v Udoka Anyanwu*** **[2011] 46 WRN 159).**

Consent in contract is more than a mere procedural requirement, it is in fact, the very essence of contractual legitimacy. It is what differentiates an enforceable contract from an unenforceable contract. However, the court, in applying this broad conceptual theory of consent to real-world analysis, has adopted an objective manifestation test, which relies on the outward manifestation of intent as measured objectively from the point of view of the other contracting party, this is known as the "reasonable person's" standard. It connotes that, if a reasonable person should examine the contractual relationship, such person will be able to testify that consent has indeed been given or manifested. Therefore, for consent to be said to have been manifested, it must be outwardly expressed and must be unequivocal and not subjective. See (***Lucy v Zehmer*** **196 Va. 493; 84 S.E. 2d 516.**

FREEDOM TO CONTRACT

The doctrine of freedom of contract is a foundational principle in contract law, expressing the liberty of individuals to choose whether to contract, with whom, and under what terms. It grants parties the autonomy to negotiate and structure agreements in a manner that reflects their mutual intentions and needs. This autonomy is crucial for upholding private relationships and promoting legal certainty.The most basic rule in common law as regards contractual agreement is that when two parties of full capacity enter into an agreement (contract) of their own free will, the court will not intervene in such dealings unless there is a compelling reason for such intervention. This is what the whole doctrine of freedom to contract is based on the idea that once a party to a contract have the "**full**" capacity to enter into such contract, the court has no reason to involve herself in such a contract.The doctrine encompasses several key elements, including the freedom to choose whether to contract,choose the terms of the contract and choose the other party.The reason for this is not far-fetched at all. It is based on the fact that the court is not a meddlesome interloper and it is only a party to a contract that knows what is best for himself/ herself. If the court were to be the one who draws up terms of a contract on behalf of the contracting parties, such parties may subsequently claim that such terms is non-est factum (not my deed) and many would try to run under this factor to keep being mischievous. Therefore, the court does not on any account draw up a contract for the contracting parties.

In **Delmas v. Sunny Asitez Int'l Ltd, (2020) All FWLR (Pt. 1026) 541. Kekere-Ekun JSC upheld** this principle, holding that once parties agree on the terms of their contract, neither the court nor a third party may vary those terms. This judicial approach reinforces the idea that contract law is meant to respect the sanctity of voluntary agreements.The principle of "**Freedom to contract"** arose again in **BFI Group Corp. v. Bureau of Public Enterprises** and the Supreme Court once again emphasised its sacrosanct character in the strongest terms as follows:

"It must be reiterated here that the court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract or their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with

regard to the contract, the terms in any document which constitutes the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties. See, Afrotech Services Nig. Ltd. v. M.A & Sons Ltd (2002) 15 NWLR (Pt.692) 720 at 788."

However, this strict rule of law is shrouded with numerous exceptions which shall be considered one after the other. Although it has been stated earlier that all individuals has the freedom to contract, not all individuals with this freedom have the capacity to contract. The law allows for all individuals to contract whenever they want to but the law as a need for protection of some groups have exempted some certain classes of people from entering into a contractual agreement because their circumstances can easily be exploited or defrauded while making bargains. This protected group include; infants, lunatics, drunkards, and illiterates.

The concept of freedom of contract developed during the 19th century in tandem with laissez-faire economics, which advocated minimal state interference.Scholars like Samuel Williston emphasized that contractual obligations stem from the voluntary consent of parties and must be enforced objectively. In The Law of Contracts, Williston maintained that courts must prioritize the intentions of the parties, rather than fairness or outcomes. Sir John Salmond, a renowned legal theorist, similarly viewed contracts as the result of the will of the parties, and thus enforceable only when that will is clearly expressed.His definition of a contract as "an agreement creating and defining obligations between parties" highlights the personal and consensual nature of contractual relations.Judicial support for this philosophy can be seen in **Printing and Numerical Registering Co. v. Sampson(1875) LR 19 Eq 462,**where **Jessel MR** stated that "**contracts voluntarily entered into shall be held sacred and shall be enforced by the courts of justice."**

In contemporary commercial practice, freedom of contract retains critical importance. It provides predictability and flexibility in business relationships, allowing parties to allocate risks and responsibilities. In **Afrotec Tech Services (Nig.) Ltd v. MIA & Sons Ltd (2000) 15 NWLR (Pt. 692) 730,** the Nigerian Supreme Court confirmed that parties are bound by the terms of their agreement and that the courts will not relieve a party simply because those terms later appear burdensome.Similarly, in **Best (Nig.) Ltd. v. Blackwood Hodge (Nig.) Ltd (2011) 5 NWLR**

(Pt. 1239) 95, the court reiterated that the judiciary must not interfere with contracts by introducing unintended terms. Courts have also consistently stressed that, unless a contract is illegal or contrary to public policy, it should be enforced as it is. This was the position in Orient Bank

(Nig.) Plc v. Bilante Int'l Ltd (1997) 8 NWLR (Pt. 515) 37, where the sanctity of contract was upheld. Nonetheless, modern developments have introduced limitations to ensure equity. The doctrines of illegality, duress, unconscionability, and public policy now moderate the rigid application of contractual freedom, particularly in cases involving unequal bargaining power.

From a jurisprudential standpoint, Williston advocated for judicial deference to the freely expressed intentions of the parties.In the same vein, **Salmond** emphasized that legal obligations should only arise where parties intentionally create them.In the Nigerian context, legal scholars like **Obilade** have noted that respect for contractual autonomy supports commerce and reinforces the rule of law. Nigerian courts have maintained this stance, provided that such contracts do not contravene statutory or equitable doctrines.The doctrine of freedom of contract remains central to the structure of modern contract law, particularly in commercial transactions. While rooted in classical liberalism, contemporary applications of the doctrine are tempered by legal safeguards to prevent abuse. Nigerian courts have embraced a balanced approach upholding autonomy while recognizing statutory and moral boundaries. As long as contracts are entered into freely and lawfully, their sanctity continues to be preserved in Nigeria's legal system.

JUDICIAL ATTITUDE TOWARDS PARTY AUTONOMY

Party autonomy refers to the principle that parties to a contract or legal agreement have the freedom to determine the terms, conditions, and governing law of their relationship, provided such choices are lawful and do not violate public policy. The judicial attitude toward party autonomy varies across jurisdictions, legal systems, and contexts, such as commercial contracts, arbitration, and family law, but courts generally uphold this principle with certain

limitations.Courts worldwide tend to respect party autonomy as a cornerstone of private law, particularly in commercial and contractual settings. This reflects the principle of freedom of contract, which assumes that rational parties are best positioned to determine their mutual obligations. Key aspects include contractual freedom, choice of law, and jurisdiction. For example, in **Foley v Classique Coaches Ltd (1934)** the court enforced an agreement despite vague terms, emphasizing the parties' intent to be bound. Similarly, courts generally respect the parties' choice of governing law and forum in international contracts.While courts generally favor party autonomy, they impose restrictions to protect public policy, mandatory laws, and vulnerable parties. These limitations reflect a balance between individual freedom and societal interests. Key constraints include public policy, mandatory laws, unequal bargaining power, third-party rights, and procedural fairness in arbitration. For instance, courts may refuse to enforce agreements that contravene fundamental principles of justice or morality, such as contracts promoting illegal activities.The judicial approach to party autonomy varies depending on the legal context. In commercial contracts, courts adopt a laissez-faire attitude, presuming parties are sophisticated and capable of negotiating fair terms. In family law, party autonomy is more restricted due to public interest in protecting vulnerable parties, such as spouses and children. In arbitration, courts strongly defer to party autonomy, reflecting the consensual nature of the process.Judicial attitudes toward party autonomy differ across legal traditions. Common law jurisdictions, such as the **UK and US,** emphasize freedom of contract but intervene in cases of fraud, duress, or unconscionability. Civil law jurisdictions, such as France and Germany, recognize party autonomy but subject it to stricter statutory limits. Islamic law also recognizes party autonomy but constrains it by Sharia principles.Recent trends show courts adapting their approach to party autonomy in response to globalization and societal changes. With globalization, courts are more willing to uphold choice-of-law and arbitration clauses to facilitate cross-border trade. Courts are also increasingly vigilant in protecting consumers and employees,reflecting societal emphasis on fairness. The emergence of blockchain-based smart contracts raises new challenges, and courts are grappling with whether to enforce automated agreements that may lack traditional consent elements.

The judicial attitude toward party autonomy reflects a tension between individual freedom and societal regulation. While autonomy promotes efficiency and respects private ordering, unchecked freedom risks exploitation and undermines mandatory norms. Courts' pragmatic

approach, upholding autonomy but policing its limits, strikes a reasonable balance but can lead to inconsistency across jurisdiction.In conclusion, judicial attitudes toward party autonomy are generally supportive, particularly in commercial and arbitration contexts, where courts prioritize contractual freedom and predictability. However, this support is tempered by limitations to protect public policy, mandatory laws, and vulnerable parties. As globalization and technology reshape legal relationships, courts continue to refine their stance, balancing respect for party autonomy with the need for fairness and justice.

ROLES OF THE COURT IN CONTRACTUAL INTERPRETATION AND CONTRACT CREATIONS.

The doctrine of freedom of contract implies the ability of parties to bargain and create the terms of their agreement without interference. See in the case of **Lochner v. Newyork**.It means parties can independently and fairly negotiate and set their own responsibilities without the government's restrictions. However this freedom is conditioned by factors like if the activities are legal, If the parties have right to freely enter into the contract and right to negotiate and terminate contracts.People are free to decide whether to enter into a contract, choose whom to contract with and set the terms and conditions.The doctrine became the strongest during the **Laissez faire era** of the 1800s. One of the key cases in this era was **Printing and Numerical Registering co v. Sampson.Though** as the society changed in the 20th century, limitations like labour laws, minimum wage and consumer protection laws were introduced.

Contract creation can be defined as the state where parties negotiate, agree and form a contract. This means that an agreement between two parties based on their terms and conditions usually embodies all the elements of contract.It is important to emphasize that Courts do not create

contracts, it is not its job to write or impose contracts for the parties. Parties themselves must voluntarily enter into the agreements and for this to happen there has to be “consensus ad idem” i.e meeting of minds of the parties. The things a court could do include;

- **Determination of the validity of the contract which involves examining whether the essential elements of contract formation like offer, acceptance, consideration, intention to enter into legal relations and capacity are present. See in the case of Felt house v. Bindley where there was no acceptance in the contract to make it valid.**
- **The court could also decide whether the agreement is enforceable which requires analysing the contract to see if it has elements of duress, undue influence, misrepresentation, mistake or illegality.**
- **The court could also imply terms only when necessary. For example courts may imply a term that goods sold must be of satisfactory quality (under law) .**

The Role of contractual interpretation arises for the court when the court is asked to determine what the contract means and how it should be applied. The court’s role is to interpret the words used in the contract not rewrite them and to determine the intention of the parties.When there is a contract relating to any arrangement between the parties, the main duty of the court is to interpret that contract and give effect to the wishes of the parties as expressed in the contract document**.It is the law that parties to an agreement retain the commercial freedom to determine the terms, no other person. Not even the court can determine the terms of a contract between parties thereto. The duty of the court is to strictly interpret its clear wordings**.In **Conoil plc v. Vitol SA**, the supreme court justices were unanimous on the contractual effect of a choice of course agreement. **Nwese JSC i**n his leading statement stated that; “**In all, the truth remains that if parties enter into an agreement, they are bound by its terms”**The motion of not being able to interfere or rewrite the contracts by the court implies the documentation of freedom of contract which protects the parties from unnecessary external influence.**Adekeye JSC** gave his view in **Best Nig. Ltd v. Blackwood Hodge that “...parties to the agreement must be in consensus ad idem as regards the terms and conditions freely and voluntarily agreed upon by them”.** This is to say the court won't interfere in the contract.Interfering in the contract and reading into it beyond what is expressly stated by the courts amounts to disrupting the sanctity of the contract. This question of sanctity of contract was raised in the case of BFI Group corp v.

Bureau of public enterprises and the supreme court again emphasized its sacrosanct character in the strongest terms. In the interpretation of contracts,there are some key principles which the court makes use of. They will be discussed briefly as follows;

- **Literal rule**:This is a method of interpretation where the court gives the words of a statute or contract their plain, ordinary and grammatical meaning even if the result seems harsh or undesirable. Here the court does not try to guess the parties' intention beyond the words used. No interpretation is added or changed. This approach respects the idea that the words used reflect the will of the parliament in statutes or the parties in the contract. See in the case of **Adegbenro v. Akintola.**
- **Golden Rule:** The literal rule led to the establishment of the Golden rule. This is because the absolute application of the literal rule might result in absurdity or unreasonability hence the Golden rule was established. It is used when there is a clear or gross balance of anomaly and the language of the statutes is susceptible to the modifications required to obtain the anomaly.

An example is the case of the **Council of the University of Ibadan v.Adamolekun**. Its purpose is to prevent injustice or absurd outcomes that may arise from the strict application of the literal rule.

- **Mischief Rule:** This is also referred to as "Interpretation by reference to statutory purpose". This is the rule that considers the statutory purpose and historical antecedent in making the state. The Court's opinion is that no meaning should be given to a statute which is contrary to the intention of the legislature. Reference is therefore made to the state of the law prior to the enactment of the statute to discern what shortcomings in the old law, the new law had come to cure. This method was laid down in Heydon's case. However the limitation of this rule is that its premise starts on a false note and fails to lay down any clear test of construing actual words used by the parliament.

The above rules are the convenient rules of practice designed over time to assist courts in interpretation of statutes.

LIMITS OF PARTY AUTONOMY

While contract law emphasises the autonomy of the parties to choose their terms, there are some sets of restrictions, i.e. mandatory rules. These are the "rules of the game" which the parties have not chosen, and most of which are not within the powers of the parties to disregard or waive by agreement. These kinds of rules are mostly showing the limitations of autonomy of contract, that there are terms, consequently the whole agreement, that the law will not enforce, even though the parties have consented to them. The Rome convention has certain provisions which limits the party autonomy and more specifically these provisions are **article 5 and 6** which relate to consumer contracts and individual contracts of the employment and these provisions have the effect of either limiting the ambit of general choice of law provisions or excluding the provisions and this limitation was not the part of the preexisting **English Conflict of laws** rules.

The limitations on autonomy of contract are, in one or another way, interferes with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being misinformed, deceived, coerced or else (**The interference is either by preventing the person from doing whatever he has decided to do, or by interfering with how he reaches his decision).** Arguments in favour of limitations in contracts are based on the idea that not only legal norms matter, rather, social norms do, and should, regulate which business practices are considered fair and socially acceptable Major limitations to party autonomy can follow from the arbitration agreement itself, implications of applicable mandatory rules or laws, rules of arbitral institutions, intervention of courts in cases of bias of arbitrators, misconduct of proceedings etc. Important restrictions can additionally follow from "public policy". This restriction owes its existence to the concept of state sovereignty; thus, every state can demarcate the boundaries within which arbitration can take place. This concept depends on the cultural, social and economic traditions of each country.Public policy can influence party autonomy in three ways: **first**, the **freedom of the parties can be limited by the rules governing the arbitrability of the arbitration agreement, second**, **an award can be set aside if it violates public policy and third, if the award infringers public policy its recognition and enforcement can be refused.**Natural justice is a further limitation to party autonomy, because if the parties' agreement violates natural justice it cannot be enforced.

Another restriction is imposed by the role of national courts because they follow the procedural law of the country concerned even if not agreed to by the parties.Another limitation is that the link to substantive and procedural law, the freedom of the parties to tailor proceedings to their needs, also has other restrictions, eg, when parties attempt to alter the rules of the administering body in a way which is unworkable or is not accepted by the administering body. Further, the arbitration agreement must be a valid one according to the law which governs it. In addition, the arbitral procedure itself should comply with the mandatory rules of law of the **"lex arbitri**", which usually is the law of the place of the seat of the arbitration.Intervention of the court might place Special restrictions on party autonomy, especially during expedited procedures provided under the rules of various arbitration institutions. As an example, the **ICC, HKIAC and SIAC** Rules shall be reviewed in this respect.

In conclusion,The principle of party autonomy is based on the freedom to contract. Limitations to party autonomy are due to the number and variety of stakeholders, who range from the parties themselves, the arbitrators, the legal institutions(court), and, last but not least, the public at large.

The parties can only exercise their party autonomy as far as public policy and the **"lex arbitri**" allow. National law defines what may be subject to arbitration, when an award is deemed to conflict with public policy, what the criteria are for an arbitration agreement to be binding on the parties, what mandatory rules of procedure apply, and when an award is valid.Furthermore, the contract agreement binds only the parties to this agreement, so that third-party involvement may be another limitation.Depending on the situation, different restrictions on party autonomy may result before the establishment of the arbitral tribunal and after that. Before the beginning of the arbitration, some restrictions regarding the drafting of the agreement may apply. Autonomy of parties, though fundamental, isn't without restrictions.

COMPARATIVE JURISPRUDENCE

Comparative jurisprudence is a crucial field of legal study that involves comparing different legal systems to identify similarities, differences, and the underlying principles that shape them. In Nigeria, a country with a multi-faceted legal system, comparative jurisprudence is particularly

relevant.The Nigerian legal system is a fascinating mix of different legal traditions. The main components are **English Common Law, Customary Law, and Sharia Law. English Common Law** forms the foundation of the Nigerian legal system, particularly in the Southern states, and is based on judicial precedent and case law. Customary Law, on the other hand, is a body of unwritten rules and practices that govern the lives of various ethnic groups in Nigeria. Sharia Law is applicable in many Northern states and governs both civil and criminal matters for Muslims.Comparative jurisprudence is applied in Nigeria in several ways. It is used in legal development and reform, judicial decision-making, academic and scholarly research, international law and human rights, and constitutional interpretation. By comparing Nigerian law with other jurisdictions, Nigeria can identify best practices and reform its laws to enhance efficiency, address contemporary issues, and align with international standards.

Despite the benefits of comparative jurisprudence, its application in Nigeria faces some challenges. The diversity of legal systems, cultural context, and access to information can make comparison complex. However, the prospects for comparative jurisprudence in Nigeria are significant. As a globalized world, Nigeria's legal system is increasingly intertwined with international commerce, human rights, and other global issues. The conscious adoption of a comparative approach in legal education, research, and judicial practice can lead to a more robust, effective, and globally relevant legal system in Nigeria.In conclusion, comparative jurisprudence is a vital field of study in Nigeria, offering numerous benefits and opportunities for growth. By embracing comparative jurisprudence, Nigeria can develop a more effective and globally relevant legal system that addresses the needs of its diverse population and promotes justice and fairness.

POLICY IMPLICATIONS OF THE FREEDOM OF CONTRACT

The doctrine of freedom of contract has significant policy implications that shape the way businesses operate and interact with each other. One of the key implications is that it encourages commercial certainty and autonomy. By allowing businesses to operate with confidence, knowing that their negotiated agreements will be enforced, the doctrine facilitates complex

commercial arrangements tailored to specific needs. This, in turn, promotes economic growth and development.Furthermore, the doctrine of freedom of contract reduces judicial activism by limiting the role of courts in interfering with private bargains. Judges are not meant to make contracts for parties, which restrains the judiciary from being overly subjective and preserves predictability in commercial transactions. This is evident in cases such as **Union Bank v. Umeh** where the court confirmed that judges should not interfere with the terms of a contract agreed upon by the parties.Additionally, the doctrine of freedom of contract encourages diligence in negotiation by placing the burden on parties to ensure fair terms. Once parties agree on terms, they are stuck with them, even if they later regret it. This places a higher duty on parties to negotiate carefully, read terms, and seek legal advice before signing. As seen in **Koiki v. Magnusson** the courts will generally uphold the terms of a contract, even if one party later claims that they did not fully understand or appreciate the implications of the agreement.

In conclusion, the doctrine of freedom of contract has significant policy implications that promote commercial certainty, autonomy, and predictability in business transactions. By understanding these implications, businesses and individuals can navigate the complexities of contract law and make informed decisions that promote their interests.

NIGERIAN COMMERCIAL REALITIES

Nigeria's commerce landscape is shaped by several realities. Inadequate infrastructure, such as poor roads and unreliable electricity, hinders trade and commerce. Complex regulations and bureaucratic processes create challenges for businesses, while corruption increases costs and undermines trust.The market is influenced by global trends, exchange rates, and trade policies, with the economy heavily reliant on oil exports. The informal sector plays a significant role, providing employment and income for many Nigerians. E-commerce growth is driven by increasing internet penetration, but infrastructure challenges hinder its development.These realities impact businesses operating in Nigeria, affecting their efficiency, costs, and profitability.

Understanding these challenges is crucial for promoting economic growth and development in the country. At the core of these is the Contract. There's no way we can discuss commercial activities without mentioning it. It's an important element in both the private and public sector. There are Legislations, however, implemented to regulate contracts as it relates to commercial realities in Nigeria. In this essay we would be discussing some legislation that addresses these commercial realities in relation to freedom of contract.

Corruption is a significant challenge in Nigeria's business environment. The **Corrupt Practices and Other Related Offences Act 2000** establishes the Economic and Financial Crimes Commission (EFCC) and provides penalties for corrupt practices. The EFCC is empowered to investigate and prosecute corruption cases, and the Act prescribes penalties for individuals and organizations found guilty of corruption. The Money Laundering (Prohibition) Act 2011 prohibits money laundering and provides penalties for individuals and organizations involved in money laundering activities. These laws aim to promote transparency and accountability in business transactions.Currency fluctuations are another reality that affects businesses operating in Nigeria. **The Central Bank of Nigeria Act 2007** establishes the Central Bank of Nigeria (CBN) as the apex regulatory authority for monetary policy. The CBN is empowered to regulate foreign exchange transactions, and the Act provides for the management of foreign exchange reserves. The Foreign Exchange **(Monitoring and Miscellaneous Provisions) Act 1995** regulates foreign exchange transactions and provides for penalties for unauthorized foreign exchange transactions. These legislations aim to stabilize the naira and facilitate foreign exchange transactions.

Regulatory challenges are also a significant reality in Nigeria's business environment. The **Nigerian Investment Promotion Commission Act 1995** promotes and regulates investments in Nigeria. The Act provides for the protection of investments and guarantees investors' rights. The **Companies and Allied Matters Act 2020** regulates companies and business operations in Nigeria, providing for the incorporation, management, and winding up of companies. These legislations aim to promote investments and simplify business operation.In contrast, e-commerce growth is a positive reality in Nigeria's business landscape. The **National Information Technology Development Agency Act 2007** promotes and regulates information technology development. The Act provides for the development of IT infrastructure and the promotion of

e-commerce. The Cybeercrimes (Prohibition, Prevention, etc.) **Act 2015** addresses cybercrime and electronic transactions, providing for the security and integrity of electronic transactions. These legislations aim to facilitate e-commerce growth and provide a framework for electronic transaction.Import dependencies are another reality that affects Nigeria's business environment. The **Customs and Excise Tariff (Consolidation) Act 2004** regulates customs and excise duties, providing for the levy and collection of duties on imported goods. The Nigerian Export-Import Bank Act 1991 provides financing for export-import activities, aiming to promote trade and facilitate imports. These legislations aim to promote trade and reduce import dependencies.Finally, the informal economy is a significant reality in Nigeria's business landscape. The **National Minimum Wage Act 2019** sets minimum wage standards for workers, aiming to protect workers' rights. The **National Agency for the Prohibition of Trafficking in Persons (NAPTIP) Act 2003** addresses human trafficking and forced labor, providing for the protection of workers' rights. These legislations aim to formalize the informal economy and promote decent work.

In conclusion, Nigeria's commercial realities are shaped by a complex array of factors, including corruption, currency fluctuations, regulatory challenges, e-commerce growth, import dependencies, and the informal economy. The legislation addressing these realities aim to promote transparency, stability, and growth in Nigeria's business environment. While freedom of contract is important, it is also essential to note that it's regulated by these legislations to prevent infringement of the law. By understanding these legislations and realities, businesses, policymakers, and investors can navigate Nigeria's market and contribute to the country's economic development.

EXCEPTIONS TO THE FREEDOM OF CONTRACT (WILL THEORY)

When discussing the Will Theory in contract law, we delve into circumstances where a contract, even though formed by mutual agreement, may not be enforceable due to certain vitiating factors. The Will Theory posits that contracts are the result of parties exercising their free will, but this principle is not absolute. There are key exceptions where the parties' consent is compromised, or the contract itself is rendered void or voidable. These exceptions include: Illegality, Mistake, Duress and Undue influence.

Illegal and void contracts

There is no precise definition of illegal contracts. However, according to Anson, where an agreement is invalidated either by express statutory enactment or by rules of common law, it is illegal. Also, where the law will not aid a claimant in a situation where the law states that such agreement is not to have legal effect, the agreement is void. Therefore, illegal and void contracts are not enforceable and both terms are used interchangeably by judges. Thus, these contracts will be classified into three:

1. Contracts illegal by statute;
2. Contracts illegal at common law; and
3. Contracts void at common law

a) Contracts Illegal By Statute

Contracts can be illegal by statute due to express prohibition, regulation of trade/profession, protection of a class/public, or revenue raising.

Examples:

- Express prohibition of certain types of contracts: ***Sodipo v. Lemminkaimen*** **[1986] 1 N.W.L.R. (Pt. 15) P.220 at 238**
- The regulation of a particular trade, profession or dealing in a particular commodity or resource: ***Solanke v. Abed*** **[1962] N.R.N.L.R. 92**
- Protection of a class, or the public, or the promotion of an object of public policy: ***Osefo v. Uwania*** **[1971] (1) A.L.R. 421**
- Revenue raising statutes***: Smith v. Mawhood (1845) 14 M. & W. 452*** (contracts violating revenue-raising statutes may not be illegal if the intention isn't to defraud the revenue)

b) Contracts Illegal at Common Law

The contents of this category of illegality have been determined by the Courts of England over the centuries. Although minor changes have occurred in the list of contracts affected, the binding link between all of them is that they are forbidden by the common law on grounds of public policy. They are generally grouped into the following:

- Committing a crime/tort/fraud (***Allen v. Rescous*** **[1676] 2 Lev. 174**)

- Prejudicing marriage (***Alake v. Chief Oderinlo,*** **High Court of Western State, Abeokuta Judicial Division, Agbaje, J. , Suit No. 23A/74 delivered on January 24, 1975. Casebook, p. 369.**
- Threatening public safety (contracts with enemy countries)
- Impeding justice (***R. v. Panayiotou*** **[1973] 3 All E.R. 112**)
- Promoting corruption (Montifiore v. Menday Motor Co. Limited [1918] 2 K.B. 241)
- Defrauding revenue (contracts involving misrepresentation)

c) Contracts Void at Common Law

Contracts regarded as void in common law as opposed to those that are both illegal and void are 3 in number. They are:

- Ousting court jurisdiction (arbitration clauses are allowed)
- Sexual immorality (***Upfill v. Wright*** **[1911] 1 K. B. 506**)
- Restraint of trade (valid if reasonable and justifiable)

Mistake

Certain factors can nullify a contract's legal validity. One of the factors that can ruin something is mistakes. A misunderstanding about the terms of a contract releases a party from their responsibilities under that contract. The legal definition of mistake in contract law is more limited compared to how a non-expert perceives a mistake. What might be seen as an error by an ordinary person is often not viewed as a mistake in the legal field. A mistake occurs when either party can cancel a contract because if they had been aware of the true facts, they wouldn't have agreed to it. Lord Atkin provided practical examples to explain the concept of mistake in the case of ***Bell v Lever Bros Ltd***, **[1932] A.C. 161**

- Types of Mistakes:
  - Common Mistake: Both parties share the same incorrect assumption about a key fact.
  - Mutual Mistake: Both parties have different understandings of the contract terms.
  - Unilateral Mistake: Only one party is mistaken, often due to misrepresentation or fraud.

Examples:

- ***Bell v Lever Bros Ltd* [1932] A.C. 161**: A buys a horse, painting, or property without knowing their true condition. A cannot seek a solution unless there's misrepresentation or warranty.
- ***Cunday v. Lindsay* (1873) 3 A.C. 459; 38 L.T. 573**: A swindler buys goods under a false identity. The contract is void due to unilateral mistakes.

Note: The law doesn't consider the quality of the content unless explicitly communicated. Mistake is only recognized if the object of the agreement doesn't exist.

Duress and Undue Influence

An individual who agrees to an offer in a contract is typically obligated by that agreement. Nevertheless, there are certain circumstances in which a party who has agreed to a contract may be able to avoid being held accountable for their obligations. The presence of duress and undue influence in a contract can enable a party to escape binding contractual liability.

- Duress in Common law: Initially limited to physical harm or imprisonment, now includes economic duress and duress involving goods.

<u>Types of duress</u>

- **Duress against a person** (violence, threats, or coercion) ***Barton v. Armstrong* [1976] 2 W.L.R. 1050**: Threats to kill can void a contract, even if not the sole reason for entering into it.

- **Duress of goods** (withholding or threatening to withhold goods) ***Skeate v. Beale* [1840] 11 A. & E. 983**: Initially, holding someone's belongings unlawfully was not considered duress, but later cases have criticized this decision. ***Maskell v. Herbert* [1915] 3 K.B. 106**: Coercion regarding goods can void a contract.

- **Economic duress** (using economic influence to force contract terms)
  ***Sibeon v. Sibotre* [1976] 1 Lloyd's Rep. 293**: Economic duress can include threats to destroy property or harm someone's business.

Undue Influence

Because the common law of duress has a limited scope, equity created a more comprehensive doctrine of undue influence that surpasses duress in common law. While the phrase "undue influence" is widely recognized, courts have not yet offered a specific definition for it. Questions arise about whether "undue" signifies illegitimate or excessive, and whether influence refers to pressure or something more subtle.

Lindley L.J. provided an early definition of undue influence in ***Alcard v. Skinner*** **[1887] 36 Ch.D. 145**, characterizing it as *"unfair or improper behaviour, external coercion, or personal gain for the guilty party."* Undue influence arises in two situations:

1. In cases where a unique bond does not exist.
2. In the presence of a unique connection

Factors which tend to influence the court on whether or not the contract should be set aside include the following:

- The substantive unfairness of the contract.
- Any unfairness in the negotiating process.
- Weakness or disability on the part of the person seeking to enforce the contract.
- Wrongdoing on the part of the person seeking to enforce the contract.
- Lack of independent advice.

CONCLUSION

In conclusion,The principle that "**parties to an agreement retain the commercial freedom to determine their own terms and no other person, not even the court can determine the terms of the contract between them"** is a cornerstone of contract law in Nigeria. This principle was aptly stated by **Kekere-Ekun JSC in Delmas v. Sunny Asitez Int'l Ltd (2020) All FWLR pt. 1026 at 541, paras: B-C.**The essence of this principle is that parties have the autonomy to negotiate and agree on terms that suit their interests, without external interference. This means that courts cannot impose terms on parties or rewrite contracts to make them more reasonable or fair. Instead, the court's role is to interpret and enforce the terms of the contract as agreed upon by the parties. By upholding this principle, courts can promote certainty and stability in commercial transactions, and ensure that parties are held to the terms they agree to. the consensus theory and will theory, as encapsulated in the quote from ***CDB Plc. v. Arc. Mfon Ekanem and Ors*. (2009) 6 NWLR 585, though** distinct, are integral components of modern contract law. The consensus theory, emphasizing the meeting of minds and mutual agreement, provides a foundation for contractual relationships. Meanwhile, the will theory, highlighting individual autonomy and freedom to contract, underscores the importance of party intention and consent.

Together, these theories shape our understanding of contractual principles, influencing the formation, interpretation, and enforcement of contracts. However, their limitations and exceptions; including issues of manipulation, misunderstanding, and external factors necessitate a complex approach.

As contract law continues to evolve, it is crucial to recognize the interplay between consensus and will, balancing the need for mutual agreement with the importance of individual autonomy. This balanced approach must also consider the impact of external factors, such as social and economic dynamics, on contractual relationships.

Ultimately, a comprehensive understanding of contract law requires acknowledging the complexities and subtleties of both consensus and will theories. By embracing this nuanced perspective, we can foster a more effective and equitable contract law system that prioritizes fairness, clarity, and mutual understanding, ultimately promoting trust and cooperation in contractual relationships.

References

- Durojaye, E. (2017). "The Principle of Autonomy in Contract Law: A Nigerian Perspective." "African Journal of Legal Studies"10(2), pp. 145–163.

- Adeyemi, A. A. (2006). "The Role of Courts in Interpreting Commercial Contracts in Nigeria." "Nigerian Journal of Commercial Law" 3(1), pp. 85–103.

- Sagay, I. E. (2010). "Nigerian Law of Contract". Ibadan: Spectrum Books Ltd.

- Elias, T. O. (1969). "The Nigerian Legal System" London: Routledge & Kegan Paul.

- Ibhawoh, B. (2014). "Imperial Justice: Africans in the Empire's Court". Oxford: Oxford University Press.

*- Olaniyan, K. (2014). *Corruption and Human Rights Law in Africa*. Oxford: Hart Publishing.*

-Delmas v. Sunny Asitez Int'l Ltd (2020) All FWLR (Pt. 1026) 541 at paras B–C.

(Supreme Court decision affirming sanctity of contract and party autonomy.)

-BFI Group Corp. v. Bureau of Public Enterprises(2012) LPELR-9339(SC).

(Emphasized the duty of parties to be bound by the terms freely agreed.)

- Odu'a Investment Co. Ltd v. Talabi (1997) 10 NWLR (Pt. 523) 1.

(- Orient Bank (Nig.) Plc v. Bilante Int'l Ltd (1997) 8 NWLR (Pt. 515) 37.

(Highlighted the court's role in interpretation, not innovation.)